

Senate Bill 94
March 18, 2009
Presented by Bob Lane
House Natural Resources Committee

EXHIBIT 1
DATE 3/18/09
SB 94

Mr. Chairman and committee members, for the record I am Bob Lane, Chief Legal Counsel of Montana Department of Fish, Wildlife & Parks (FWP).

FWP supports SB 94, but urges the Committee to carefully consider two amendments to the original bill. Most of the statutory changes proposed by this bill refine technical aspects of hydrogeologic assessments, aquifer recharge plans and mitigation plans. These proposed changes are based on DNRC's experience in working with applicants and reviewing such plans over the last year and half, and I believe that they are good proposals.

As originally drafted, the bill would exempt groundwater applications for nonconsumptive uses from the requirements for hydrogeologic assessments. FWP appreciates that the bill was amended to include a definition of nonconsumptive use in 85-2-360 (2)(B), though I would urge the committee to consider dropping the words "substantially" from (2)(B)(ii) and "little" from subsection (iii). These words are not necessary and only create the potential for argument and litigation.

FWP is very pleased that SB 94 makes it clear that a mitigation or aquifer recharge plan may not include the elimination of vegetation that uses water as a way to offset withdrawals from the aquifer. Elimination of cottonwood trees and the like has potentially harmful effects on wildlife and fisheries. Similarly, the bill would prohibit an applicant from counting runoff that results from newly paved parking lots and rooftops toward mitigation.

Unfortunately, that very provision of the bill, which is Section 3, subsection (4) - lines 23 through 26 of page 6 was amended. The current version reads, "This subsection does not apply to actions that increase the efficiency of existing conveyance structures." In other words, this additional language suggests that irrigators could capture the water lost through inefficient ditches by lining those ditches, and market that water for mitigation. It would not necessarily make that practice legal due to other provisions in the law such as the criteria for changing water rights. However, the amendment creates an ambiguity over an issue that is important enough to be considered separately from this bill and debated on its own merits.

Certainly, the practice of selling mitigation credits for diverted but unconsumed water, such as water that leaks from a ditch, could benefit those with inefficient water conveyance systems. However, there's a problem. Water that leaks from ditches adds to the groundwater and eventually returns to surface water. As returning groundwater, it is appropriate by others for irrigation, stock water and domestic supply. Lining the ditch and infiltrating that water into the ground in another location as mitigation water only means that the water rights it originally supplied and the depletions they cause are now unmitigated, or worse, they do not get water at all. Adding new consumptive uses would still result in a net loss to the hydrologic system. The depletions simply occur somewhere else. This defeats the purpose of the mitigation plan.

Therefore, I urge you to consider an amendment to remove the last sentence on lines 26 and 26 on page 6 of this bill. Without that language, FWP supports SB 94.

Thank you.